89-418

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BENJAMIN FRANCO, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

Whether Claims Court jurisdiction exists under the Tucker Act, 28 U.S.C. § 1491(a)(1), and the Back Pay Act, 5 U.S.C. § 5596, over petitioners' claims for back pay or damages when:

(1) the government knowingly violated the petitioners' pay and benefits statute, 20 U.S.C. § 241(a), by compensating the teachers of U.S. military dependents in Puerto Rico at a lower hourly rate than teachers in the District of Columbia public schools?

(2) the government knowingly violated 20 U.S.C. § 241(a) by requiring the teachers to work longer hours than their counterparts in the District of Columbia?

(3) the government knowingly breached the provisions of a written collective bargaining agreement by requiring the petitioners to work longer hours at lower hourly rates than their D.C. counterparts, contrary to the requirements in 20 U.S.C. § 241(a) which were incorporated by reference into the agreement?

PARTIES

Benjamin Franco, Paul Trittschuh, II, Randy Mintz, Brenda Ferrer, Abraham Aponte, Thomas Yeager, Lily Ortiz, James Keech, Linn Wallace, Judy Sholy, and Scepter, Inc., for themselves and on behalf of all others similarly situated,

and

Rashid Abdur-Rahman, Majorie Adams, Lawrence Albert, Noemi Alcaide, Diane K. Ammons, Ruth Andrews, Juanita Angueira, Nora Arias Avila, Ann Barron, Bette Bender, Helen Beraza, Susannah Benson, Dolores Bielecki, Iris Bland, Robert Bland, Sydney Burset, Gregory Bush, Zaida Cacho, Joan Campbell, Naomi Dafini Corbin, Amalia Carrasquillo, Victor Castro, Joseph Cherry, Jacqueline Barter Clark, Sharon L. Crane, Carmen Colberg, Howard Conway, Aida Coriano, Cynthia Costa, Delia Costa, Noel Costa, Laurie Crespo, Esperanza Escobar Dadaian, Jean Davis, Delia Decorral, Aida De La Matta, Maria Rodriguez Deyeager, Thomas Dodd, Maxine Edmisten, Ruth Elberson, Carl Engebretson, Hector Franco, Hector Garcia, Luldes Giraud, Thelma Gorney, Virginia Goyanes, Gloria Goytia, Gerson Gurell, Peggy Halpern, Anderlyn Harrison, Marcia Hellmold, Elizabeth Hennig, Myron Herrick, Josefina Higuera-Pereda, Elaine Hinman, Wilma Hocking, Carol Holland, Merlin Howell, Maria James, Waynna Laura James, Nancy Janoson, Elizabeth Jenkins, Abby Jensen, Gordon Johnson, Nathalie Joy Justicia, Marianne Kavanaugh, Doris Keech, Audrey Kriss, John Ladd, Paula Ladd, Joseph Laframboise, Anne Latham, Nancy Lee, Frances Lewis, Maria E. Lipuscek, Johanna Lopez, Alma Luke, Eileen MacMackin, Awilda Maldonado, Nilda Maldonado, Isis Martinez, Joyce Bryan Marzullo, James McAllister, Maria McCurdy, Grant McFeron, Nancy McHarg, Roberson McKinney, James Merrick, Frederick Miller, Janet Koncick Mintz, Pauline Miranda, Barbara Mitchell, Gladys Montalvo, Gloria Montalvo, Margot Moskonas, Edna Negron, Roberto

Negron (Estate) Gwen Negron, Elizabeth Nieves, Frances Nochera, Bernadette O'Brien, Jack O'Leary, Sara Olivencia, Peggy C. Oliver, Tonilee Oliverio, Floyd Olson, Socorro Ortiz, Henry Otero, Valerie Owen, Carl Pachucki, Bonnie Palmer-Govero, Linda Parker, Vince Parton, Doris Partridge, Elizabeth Pawson, Antoinette Torres Perez, Laura Perez, Donald Peters, Pamela Porter, Nicolas Quinones-Coll, David O. Quintin, Erle Ramsey, Ignacio Reinosa, Herbert Rien, Jean Rien, Shirley Riley, William Rimel, Carmen Rivera, Lillian M. Rivera, Yolanda Rivera, Nadja Robinson, Jean Rodriguez, Ann Roettger, Herald Roettger, Jr., Nilda Roman, Roberto Rosales, Laverne Jean Ruiz, Clifton Rush, Mary Ann Rush, Celestino Santiago, Daisy C. Schneider, Herschel Sessions, Jerome Sicinski, Doris Sierra, Frank Smith, Maxine Smith, Theresa A. Smith, Mary Smolen, George G. Snyder, Mark Soderberg, Jose Solis, Jr., Lynda Southworth, Karen Spurgeon, Marilyn Stalzer, Guadalupe Sumner, Evelyn Switzer, Sandra Switzer, Helen Szczesniak, Cathleen Torres, Ellyha Torres, Alice Urbiztondo, Jerry Van Buren, Santos Vazquez, Julie Wallace, Lee Walsh, Richard Wilbur Washburn, Sharon Weidlein, Stephen Weidlein, Milton H. Weiss, John Wells, John White, Lynn White, Pamela A. Woodard, Isabel Williams, Martha Jane Williams, Lucy Wilson, Pamela Wilson, and Virginia Woollis,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Federal Circuit has not been prepared for publication, and will not be reported (App. 1a).

The opinion of the United States Claims Court granting the defendant's Cross-Motion for Summary Judgment is reported as *Franco v. United States*, 15 Cl. Ct. 283 (1988) (App. 5a).

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on May 16, 1988. (App. 20a). Timely Petition for Rehearing was filed, and was denied on June 13, 1989. (App. 23a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

28 U.S.C. § 1491(a)(1) (1982) (App. 24a)

20 U.S.C. § 241(a) (1982) (App. 24a)

5 U.S.C. § 5596 (1982 & Supp. V 1987) (App. 26a)

5 C.F.R. §§ 550.801-.807 (1988) (App. 29a)

STATEMENT OF THE CASE

Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Federal Circuit, which affirmed the United States Claims Court's dismissal of their claims for lack of subject matter jurisdiction.

Petitioners here contend that the Claims Court has jurisdiction over their claims under the Tucker Act, 28 U.S.C. § 1491(a)(1) (1982). They have stated claims upon which damages may be awarded under three alternative sources of substantive law: the Back Pay Act, 5 U.S.C. § 5596; the petitioners' own pay statute, 20 U.S.C. § 241(a); and the petitioners' collective bargaining agreement with their employer, the United States.

1. *Nature of the Case.*

The petitioners are teachers employed by the United States on U.S. military bases in Puerto Rico. By statute, 20 U.S.C. § 241(a), they are entitled to the same "compensation" and "hours of work" as public school teachers in the District of Columbia. The purpose of this statutory entitlement, enacted in 1978, was to protect the teachers from further abuses by recalcitrant administrators of their superior bargaining power.[1] Nevertheless,

[1] The statutory guarantee of equality with D.C. teachers was enacted at the request and for the protection of the teachers in this case. In proposing this provision as an amendment to the statute, Puerto Rico's representative to Congress, Mr. Baltasar Corrada del

from 1978 to 1986 the petitioners were required by school administrators (also federal employees) to continue working longer hours, for lower compensation, than Congress mandated.

Much of the time from 1978 to 1986 elapsed while the teachers attempted to resolve the problem through arbitration under their collective bargaining agreement. Ultimately the arbitrators determined they had no authority to interpret and enforce a federal statute and were thus unable to enjoin further violations or award back pay. In the parties' 1986 collective bargaining agreement, the teachers succeeded in negotiating a reduction in their hours of work to the level prevailing in the District of Columbia, and they filed this action for back pay for the period from 1978 to 1986.

The lower courts have now determined that they, too, lack back pay authority. The reason given was that the petitioners received the same annual compensation as teachers in D.C., notwithstanding that they had received much lower hourly compensation. An injunction against the longer hours, the courts said, was the teachers' only remedy.

The trial judge was clearly troubled by his decision. At the last hearing prior to his ruling, Judge Wiese stated to plaintiffs' attorney: "Let me say this, my sympathies lie on your side of this problem. I am not happy saying that we do not have jurisdiction, it is not good law and it is poor justice." R. 1275.

The lower courts' rulings are, indeed, bad law and poor justice. The error of greatest importance, perhaps,

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Rio, explained: "The amendment spells out clearly what is already implicit if somewhat ambiguous in current law . . . But interpretations by recalcitrant administrators have led to protracted arbitration, [and] waste of time and energy on the part of both teachers and administrators[.]" R. 552. (Citations to the record in this petition refer to the Joint Appendix on appeal.)

is that the rulings rest on a recent Back Pay Act case which the Solicitor General has admitted was wrongly decided[2] and which three Justices of this honorable Court have said would "render the Back Pay Act a nullity[.]" *Hambsch v. United States*, —— U.S. ——, 109 S. Ct. 1969, 1971 (1989) (O'Connor, J., joined by Scalia, J., and Kennedy, J., dissenting from the denial of certiorari).

It strains credulity to conclude that a statute mandating certain compensation and hours of work for federal employees is not enforceable under the Back Pay Act. Yet that is what the lower courts held in this case. As Justice O'Connor wrote of an identical line of reasoning in *Hambsch*, "the error is plain, and . . . it carries the clear potential of compounding itself in the Back Pay Act jurisprudence of the Court of Appeals for the Federal Circuit[.]" *Hambsch*, 109 S. Ct. at 1969.

The error of *Hambsch* has now been compounded, as Justice O'Connor predicted. Whereas that case involved one federal employee whose own actions were somewhat suspect, this case involves 188 teachers of unquestioned integrity whose statutory right to certain compensation and hours of work was flagrantly ignored by a recalcitrant management for eight years. Left uncorrected, the Back Pay Act jurisprudence of the Federal Circuit will continue to deny recovery to untold numbers of federal employees with meritorious claims in the future.

A second reason why the lower courts' decisions in this case are, as the trial judge acknowledged, bad law and poor justice is that they turn normal principles of law and equity upside down. Whereas all lawyers are trained to view injunctive remedies as a last resort, to

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[2] "The Solicitor General has informed this Court that the United States views the jurisdictional holding of the Court of Appeals as plainly wrong and asks that its decision be vacated and remanded." *Hambsch*, 109 S. Ct. at 1969 (O'Connor, J., dissenting).

be sought and granted only where the remedy at law (*i.e.*, monetary compensation) is inadequate, in this case the lower courts held that an injunction against the school administrators' further violations of the statute was the teachers' only remedy.

Certainly this is not what Congress intended. Congress directed (in this statute, 20 U.S.C. § 241(a)) the responsible executive agencies to provide certain compensation and hours of work to these specific federal employees. Congress separately authorized (in the Back Pay Act, 5 U.S.C. § 5596) federal employees in general to recover back pay for their agency's failure to confer a benefit provided by law. And Congress granted (in the Tucker Act, 28 U.S.C. § 1491) jurisdiction to the Claims Court over cases founded upon any Act of Congress. What more could Congress be expected to say in order to authorize recovery in this case?

A third fundamental error in the lower courts' decisions is that they were based upon an invalid assumption. Both the Claims Court and the Federal Circuit Court assumed, incorrectly, that the term "compensation" in the statute refers only to annual compensation and not to hourly compensation. There is no evidence whatever in the record to support this assumption. Petitioners contend the statute concerns both hourly and annual compensation. A remedial statute should be given a broad construction. If, however, one or the other measuring rod must be adopted, it is far more likely that Congress intended the petitioners' *hourly* compensation to be the same as in the District of Columbia. Then even the *Hambsch* case would not stand in the way of recovery under the Back Pay Act in this case.

The United States, acting through its school administrators, violated two separate terms of the statute—one requiring certain hours of work and the other requiring certain compensation. Even if there were no violation

of the compensation provision of the statute, back pay or other damages would still be available for the incontrovertible violations of the hours-of-work provision. The existing law of the Federal Circuit supports the implication of a damages remedy directly from this statute. The Court of Appeals failed to discern that a monetary remedy might be implied from the hours-of-work provision alone; its short opinion focuses only upon whether compensation would be available under the Back Pay Act for the additional hours of work. This case presents an opportunity for the Supreme Court to clarify when monetary remedies may be inferred directly from federal personnel statutes without resort to the Back Pay Act.

In holding that the Back Pay Act does not entitle federal employees to what it called "additional" compensation, but only to the restoration of a "withdrawal or reduction" of pay, the Court of Appeals manufactured a new impediment to relief under the Back Pay Act, one that had not been briefed or even suggested to the court and carries serious implications for all federal employees. The court's holding (which it announced without any elaboration or citation of case authority) flies in the face of a 1978 amendment to the Back Pay Act which authorizes recovery for "the omission or failure to take an action or confer a benefit." Review by this Court is now essential to give proper recognition to this amendment.

Another unsupported assumption made by the lower courts concerned the interpretation of the collective bargaining agreement. In that agreement, the parties voluntarily undertook a private contractual obligation to comply with relevant federal laws. The lower courts, however, assumed that the parties could not have intended a damages remedy for a violation of their contractual obligation if the same violation was not remediable under the Back Pay Act. Clearly this is a *non sequitur;* the parties to a contract can agree to a lot of things, includ-

ing a damages remedy for a statutory violation that, in the absence of the contract, might not warrant back pay. Thus, this case raises important issues concerning the relationship between statutory and contractual remedies in the context of federal employment.

2. *Statement of Facts.*

The petitioners are employed in the Antilles Consolidated School System ("ACSS"), an agency of the United States Navy, and are responsible for educating the children of personnel stationed at U.S. military bases in Puerto Rico. App. 7a. As a school system outside the fifty states, ACSS is directed under 20 U.S.C. § 241(a) to provide educational opportunities "comparable to free public education provided for children in the District of Columbia."

In 1978, ACSS teachers testified before Congress that, by not specifying personnel practices, § 241(a) invited school administrators to abuse their authority. App. 14a. As a result of this testimony, Congress amended 20 U.S.C. § 241(a) by inserting the sentence upon which the petitioners base their claims:

> Personnel provided for under this subsection outside of the continental United States, Alaska, and Hawaii, shall receive such compensation, tenure, leave, hours of work, and other incidents of employment on the same basis as provided for similar positions in the public schools of the District of Columbia.

Pub. L. 95-561, § 1009(a), 92 Stat. 2143, 2309 (1978).

The ACSS administration refused to implement the "hours of work" requirement for almost eight years. During the period 1978-1982, for example, the average length of the ACSS teachers' on-site duty day was one hour longer than in the District of Columbia, with a lunch period that was 15 minutes shorter. App. 7a. At

the extreme, during this period Antilles High School teachers' daily on-duty hours were 25% longer than those of D.C. high school teachers, equivalent to more than one extra day per week of required on-site working time. The ACSS teachers did not achieve parity in hours of work until a new collective bargaining agreement became effective in April, 1986.

Despite their additional hours of work (and, incidentally, despite their greater teaching loads), the ACSS teachers only received pay at the same *annual* rates as D.C. teachers. App. 7a. This practice translated into substantially lower *hourly* rates of pay for ACSS teachers as compared to D.C. teachers. While they never refused to perform their duties, the ACSS teachers have diligently sought a determination of their right to compensation under the statute for the past 11 years. Thus far, however, their attempts even to obtain a hearing on the merits of their claims have proved futile.

The ACSS teachers' union sponsored a grievance in early 1981 seeking back pay for the longer hours of work. The grievance went to arbitration in late 1981, but the federal arbitrator concluded that interpreting and applying the statute was beyond his purview. FMCS 81/K27374 (Dec. 28, 1981) (Bennett, Arb.). Another arbitrator came to the same conclusion in a subsequent grievance. FMCS 84K/04069 (May 1984) (Hoffman, Arb.).

The parties entered into a new collective bargaining agreement in April, 1986. Although the ACSS teachers agreed to include a clause stipulating that the new agreement achieved parity in hours of work with D.C. teachers, they refused to waive their rights to pursue back pay for past violations of § 241(a).

3. *Course of Proceedings Below.*

Ten ACSS teachers, selected by vote of their colleagues, filed the complaint initiating this action in the United States Claims Court on June 18, 1986. The original complaint was filed as a class action on behalf of the named

plaintiffs and all other similarly situated ACSS non-supervisory professionals. The Claims Court, Wiese, J., denied the teachers' motion for class certification in February, 1988. *Franco v. United States*, No. 388-86C (Cl. Ct. Feb. 19, 1988). The case was then expanded to include all 188 teachers who had agreed to participate in this action.

On August 16, 1988, relying on the Federal Circuit's decision in *Hambsch*, the Claims Court issued its decision granting the defendant's motion for summary judgment on the ground that the court lacked subject matter jurisdiction over the teachers' claims. *Franco v. United States*, 15 Cl. Ct. 283 (1988); App. 5a. The teachers appealed to the United States Court of Appeals for the Federal Circuit. On May 16, 1989, a panel of the Federal Circuit affirmed the court below in a curt, unreported opinion, with Newman, J., concurring in the result. *Franco v. United States*, No. 89-1012 (Fed. Cir. 1989); App. 1a. A rehearing petition was denied on June 13, 1989. App. 23a.

ARGUMENT

A. SUMMARY OF ARGUMENT

The 1978 amendment to the ACSS teachers' pay and benefits statute, 20 U.S.C. § 241(a), entitles them to compensation and hours of work on the same basis as District of Columbia school teachers. During 1978-1986, the ACSS administration knowingly violated the statute by requiring the teachers to work longer hours and at lower rates of pay. Claims based on these breaches of the government's duty to provide specified statutory economic benefits, *i.e.*, equivalent hours of work and hourly rates of pay, are within the Claims Court's Tucker Act jurisdiction as claims founded upon an Act of Congress. 28 U.S.C. § 1491(a)(1).

Since the Tucker Act provides an express waiver of the United States' sovereign immunity for claims within its ambit, the statute creating the plaintiffs' substantive rights need not also provide a separate, express consent to suit. *United States v. Mitchell*, 463 U.S. 206, 216, 218-19 (1983) (*Mitchell II*) (overruling language to the contrary in *United States v. Testan*, 424 U.S. 392, 398, 400 (1976)). Instead, a claim for money damages is cognizable under the Tucker Act if the substantive source of law, either expressly or by implication, "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Mitchcell II*, 463 U.S. at 216, 217 n.16, *quoting Eastport Steamship Corp. v. United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967). In the present case, 20 U.S.C. § 241(a) by implication mandates money damages for the ACSS teachers' additional hours of work. Only by equilibrating the ACSS teachers' hourly rates of pay can they receive "compensation . . . [and] hours of work . . . on the same basis" as the D.C. teachers during 1978-1986.

If the Tucker Act's waiver and the mandate in the teachers' pay and benefits statute were not enough, the Back Pay Act, 5 U.S.C. § 5596, also provides Congress' express consent to suit based upon the government's wrongful withholding of pay and benefits to which the ACSS teachers were entitled by law. Indeed, the Back Pay Act has been cited extensively by this Court as the classic example of a statute triggering the Claims Court's Tucker Act jurisdiction. *See, e.g., Bowen v. Massachusetts*, 487 U.S. ——, 108 S. Ct. 2722, 2735 n.31, 2738 n.42 (1988); *Id.* at 2747-48 (Scalia, J., dissenting).

The Back Pay Act of 1966 is the primary vehicle by which Congress intended to make federal employees whole after they have been subjected to an "unjustified or unwarranted personnel action," as in the instant case. *See* S. Rep. No. 1062, 89th Cong. 2d Sess. 1 (1966), *reprinted in* 1966 U.S. Code Cong. & Ad. News 2097. The

1978 amendments to the Back Pay Act clarified that such a "personnel action" also includes "the omission or failure to take an action or confer a benefit. Pub. L. No. 95-454, § 702, 92 Stat. 1111, 1216 (1978), 5 U.S.C. § 5596(b)(4) (Supp. V 1987); *see also*, 5 C.F.R. § 550-.803 (1988). The ACSS administration's failure to set hours of work or to pay hourly compensation on the same basis as in the District of Columbia schools, as required by 20 U.S.C. § 241(a), brings the teachers' claims squarely within the Back Pay Act's scope.

The violations of the statute also breached the collective bargaining agreement and are actionable under the Tucker Act's contract clause. Since § 241(a) was incorporated by reference into the agreement, the remedy for violations of the statute in this context becomes a separate question of contract law, rather than one of statutory interpretation.

B. THE COURT OF APPEALS MISREAD THE STATUTE BY CONSIDERING ONLY ANNUAL COMPENSATION.

In its short, unreported opinion, the Court of Appeals concluded simply that because the ACSS teachers received (it said) "compensation equal to" D.C. teachers, they were not entitled to additional compensation for their additional hours of work, App. 3a. The simplicity of that logic masks a critical but unsupported assumption that 20 U.S.C. § 241(a) only requires equal *annual* compensation. Indeed, the court's quotation of the Claims Court's undisputed finding of fact conveniently excises the word "annual." See *Franco*, 15 Cl. Ct. at 284; App. 7a.

The word "annual" does not appear in 20 U.S.C. § 241(a), nor is it fairly implied by the other language of the statute. Instead, the terms "compensation" and "hours of work" are conjunctive in § 214(a), and are related to those of the D.C. teachers by the phrase "on

the same basis as[.]" On a closer analysis, this 1978 amendatory sentence of § 241(a) is more properly interpreted as mandating parity in hourly compensation between the two school systems.[3]

The sole case cited by the Court of Appeals in support of its denial of the teachers' statutory entitlement was a case that the teachers' counsel brought to the court's attention. The Court of Appeals cited *Begay v. United States*, 16 Cl. Ct. 107 (1987), *aff'd*, 865 F.2d 230 (Fed. Cir. 1988), for the proposition that if there is a maximum entitlement to monies under a statute, it places a ceiling on the Claims Court's Tucker Act jurisdiction for claims arising under the statute. App. 4a. In the context of this case, however, applying the *Begay* holding only begs the question: does § 241(a) entitle the ACSS teachers to receive the same hourly compensation as their D.C. counterparts?

The statutory provisions and the types of claims at issue in *Begay* were quite different than the ones at issue in this case. The Begays were Navajo Indians who had been the victims of shoddy practices under the Navajo and Hopi Indian Land Settlement Act, 25 U.S.C. §§ 640d, *et seq.* They sought $1,000,000 each in economic, social, cultural, and psychological damages based on the government's failure to ensure "decent, safe and sanitary housing" as described in the statute. *Begay*, 865 F.2d at 231.

Unlike the present case, however, the *Begay* relocation statute, 25 U.S.C. § 640d-14(b), placed a specific

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[3] The compensation of federal employees is often expressed as an hourly rate. For example, the proposed regulations of the Office of Personnel Management governing the living cost allowances of these teachers, and all other federal employees in non-foreign areas like Puerto Rico, state that "allowances . . . are calculated and paid as a percentage of an employee's *hourly rate* of basic pay for those hours for which the employee receives basic pay." Proposed Amendments to 5 C.F.R. Part 591, 54 Fed. Reg. 23,664, 23,670 (1989) (emphasis added).

maximum dollar amount on the relocation benefits, and the Begay families had each already received the maximum stated amounts. *Id.* at 231; 16 Cl. Ct. at 111 n.3, 122 n.12. The plaintiffs having received the full entitlement to economic benefits provided by the statute, the *Begay* courts were not inclined to recognize a cause of action for the other non-economic consequential damages. *Id.*, 16 Cl. Ct. at 124, 133-134; 865 F.2d at 231-232.

In contrast, the ACSS teachers only claim the hourly compensation to which their pay and benefits statute entitles them, a purely economic entitlement. To read into § 241(a) an absolute statutory ceiling equal to the D.C. teachers' annual compensation does violence to the purpose and the language of the 1978 remedial amendment. It must be remembered that the language in question was enacted at the request and for the protection of the teachers in this case. Considering the relevant sentence of § 241(a) as a whole, the statute can be most fairly interpreted as mandating that ACSS teachers' compensation be paid at the same hourly rate as for comparable positions in the District of Columbia.

C. THE COURTS BELOW APPLIED ERRONEOUS STANDARDS FOR INFERRING A MONETARY CAUSE OF ACTION.

In erroneously relying on the *Begay* holding, the Court of Appeals ignored the sound analytical model for inferring statutory remedies followed by the lower court in that case. *See Begay v. United States*, 16 Cl. Ct. 107, 120-122 (1987). Applying the *Begay* model to the ACSS teachers' claims, which was counsel's purpose in bringing the case to the attention of the Court of Appeals, the teachers' pay statute clearly satisfies the requirements established by this Court for stating a cause of action under the Tucker Act.

The *Begay* court's analysis, and the one here urged by the petitioners, begins by recognizing this Court's

holding in *Mitchell II*, *supra*, that the Tucker Act provides the requisite Congressional waiver of sovereign immunity. *Id.* at 120. The court also recognized that, notwithstanding the Tucker Act waiver, the plaintiffs' substantive right to recover money damages must be founded on some other source of law. *Id.* at 121. In view of the Tucker Act waiver, however, the substantive law need not also contain a separate waiver of sovereign immunity, and may grant a right to recover money damages "by either express language or by implication." *Id.* at 121, *citing Mitchell II*, *supra*, 463 U.S. at 217 n.16. Thus, for a money damages claim to be cognizable under the Tucker Act, the claimant need only "demonstrate that the source of substantive law he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.'" *Begay*, 16 Cl. Ct. at 121, *quoting Mitchell II*, *supra*, 463 U.S. at 216-17, *quoting Testan v. United States*, *supra*, 424 U.S. at 400, *quoting Eastport Steamship Corp. v. United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967).

To determine when a statute "can fairly be interpreted" to imply a cause of action for damages under the Tucker Act, the *Begay* court applied the following three-part test:

1) A right to a benefit is conferred by statute;

2) The benefit conferred is economic in nature;

3) The government breaches its duty to confer the benefit.

Id. at 121. The *Begay* court borrowed this sensible and straightforward test from *Anderson v. United States*, 5 Cl. Ct. 573, 577 (1984), *aff'd*, 764 F.2d 849 (Fed. Cir. 1985), which the petitioners in this case relied on in both of the courts below.

The *Anderson* court's opinion was one of the first Claims Court opinions to grapple with the *Mitchell II*

modification of *Testan* in the context of federal employees' back pay claims. In *Anderson*, temporary construction workers sought the monetary equivalent of the leave, insurance, allowances, and pay they would have received as prevailing-rate employees. *Anderson*, 5 Cl. Ct. at 575. However, since such temporary employees were excluded from receiving those benefits by applicable statutes and regulations, their claims failed to satisfy the first prong of the test, *i.e.*, they were not statutorily entitled to the benefits. *Id.* at 580. Thus, since the *Anderson* claims depended on the plaintiffs' reclassification as prevailing-rate employees, their claims were barred under the principle for which *Testan*, *supra*, still stands.

Significantly, the *Anderson* court noted that *if* the employees had been entitled to receive those benefits under their classifications, the types of benefits involved were "part of an overall compensation plan and therefore they are essentially economic in nature." *Id.* at 580. Similarly, applying the *Anderson* test in the present case: (1) the ACSS teachers were entitled to the benefits specified in § 241(a), *i.e.*, hours of work and hourly compensation on the same basis as for D.C. teachers; (2) those benefits were essentially economic in nature; and (3) the government breached its duty to confer those economic benefits.

The Claims Court's opinion rejected the *Anderson* test outright without analyzing its logic. *Franco*, 15 Cl. Ct. at 286-87; App. 10-11a. Instead, the Claims Court chose to follow the erroneous *sua sponte* jurisdictional holding in *Hambsch v. United States*, 848 F.2d 1228 (Fed. Cir. 1988). *Id.* at 287-88; App. 12-13a. As a result, the Claims Court in this case searched in vain for an "unequivocally expressed" waiver of sovereign immunity contained within the terms of § 241(a). *Id.* at 281-288; App. 13-15a. Apart from contravening *Mitchell II*, which it dismissed as an Indian case, the Claims Court's approach imposed an impossibly high burden on the ACSS

teachers. As Justice O'Connor recently observed, "rarely if ever will an agency personnel regulation or collective bargaining agreement contain an express waiver of the sovereign immunity of the United States." *Hambsch, supra*, 109 S. Ct. at 1971. By allowing the Claims Court's opinion to stand, the Court of Appeals in this case has ensured that the ruling in *Hambsch*, which even the Solicitor General admitted was wrongly decided, will continue to thrive in the jurisprudence of the Federal Circuit.

D. THE COURTS BELOW INVERTED THE RELATIONSHIP BETWEEN LEGAL AND EQUITABLE REMEDIES.

Rather than recognizing jurisdiction over the teachers' back pay claims, the Court of Appeals held that the teachers' only remedy was injunctive relief in the district court for "an adjustment in the hours they are required to work." App. 4a. This holding mirrors the Claims Court's opinion, which concluded that § 241(a) "expresses an emphasis demanding literal enforcement," and that "adherence to the legislative scheme requires that plaintiffs seek specific relief to remedy an imbalance in hours of work[.]" App. 14a. However, even if the teachers could have obtained timely injunctive relief back in 1978, that option is meaningless today, 11 years after the statutory violations began and 4 years after the teachers finally achieved parity with D.C. teachers. A thoughtful analysis demonstrates that equitable relief would have made little more sense in 1978 than it does today.

Because of the nature of the relief sought, and its potential effects on the educational curricula within the ACSS system, the federal district court would have been highly unlikely to insert itself into the heart of the school system's administration. While the federal district court's intrusion into complex and interconnected matters of local

school administration may perhaps be justifiable to remedy racial discrimination, such a step would be unusual and ill-advised to remedy a federal personnel matter. And considering the history of the ACSS administration's recalcitrance both before and after the 1978 amendment to § 241(a), the district court's involvement in the ACSS system would certainly have been an ongoing task, if it were to have been effective at all. In any case, the direct costs to the government of providing additional teachers in response to a court-supervised staffing plan would probably have exceeded the costs of retroactively compensating these teachers for their additional hours of work.

Moreover, it is doubtful that the federal district court would have been able, jurisdictionally or practically, to act in time to prevent substantial losses to the teachers. As this Court had already emphasized emphatically in the context of a federal personnel claim, "[t]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Sampson v. Murray*, 415 U.S. 61, 88 (1974), *quoting Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-507 (1959). In that employee discharge case, the Court noted that "temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury." *Sampson*, 415 U.S. at 90 (footnote omitted). In view of the employee's ultimate remedy at law provided in the Back Pay Act, the Court held that the employee could not show the type of irreparable injury sufficient to support her preliminary injunction. *Id.* at 90-92.

Surely the government would have used *Sampson v. Murray* to resist the teachers' request for a preliminary injunction. Following this Court's guidance, the district court would undoubtedly have regarded the Back Pay Act as an obvious and entirely adequate remedy at law for the violation of the ACSS teachers' hours of work statute, thus precluding preliminary injunctive relief.

Only in the current jurisprudence of the Court of Appeals for the Federal Circuit is the Back Pay Act regarded as an ineffectual piece of legislation that can only be resorted to, if at all, when equitable remedies are inadequate.

E. THE COURT OF APPEALS AGAIN NULLIFIED THE BACK PAY ACT.

The Court of Appeals held that the Back Pay Act did not grant the ACSS teachers a cause of action because "the alleged unwarranted personnel action has not 'resulted in the withdrawal or reduction' of appellants' pay." App. 4a, *quoting*, 5 U.S.C. § 5596(b)(1). The Claims Court's opinion also off-handedly disposed of the teachers' Back Pay Act claims by stating: "Since we hold that plaintiffs do not have a right to command the payment of money under 20 U.S.C. § 241(a), it *adds nothing* to their case to say that their claims are also founded on the Back Pay Act[.]" *Franco*, 15 Cl. Ct. at 288 (emphasis added); App. 15a. These narrow jurisdictional views of the Back Pay Act are clearly erroneous. They compound the error in the line of cases comprising the Federal Circuit's current jurisprudence which "would render the Back Pay Act a nullity[.]" *Hambsch, supra*, 109 S. Ct. at 1971 (O'Connor, J., dissenting).

The Court of Appeals' requirement for a "withdrawal of reduction" wholly ignores the clarifying language added to the Back Pay Act as part of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 702, 92 Stat. 1216 (1978). As a result of the 1978 amendments, the Back Pay Act now defines "personnel action" to include "omission or failure to take an action or confer a benefit." 5 U.S.C. § 5596(b)(4). Congress specifically intended the 1978 amendment to incorporate the long-standing administrative interpretation of the Act as including "failures to make *additional* payments that were mandated by law, *e.g.*, a statutory periodic increase

or a benefit conferred by a non-discretionary administrative regulation." *Spagnola v. Stockman*, 732 F.2d 908, 912 (Fed. Cir. 1984), *citing* S. Rep. No. 969, 95th Cong., 2d Sess. at 114-115, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2723, 2836-37. This interpretation is also made explicit in the regulations promulgated under the Back Pay Act, which define "[u]njustified or unwarranted personnel action" to include "an act of omission (i.e., failure to take an action or confer a benefit) [.]" 5 C.F.R. § 550.803.

The ACSS teachers' claims do not arise from an actual reduction in pay or benefits compared to what they previously enjoyed, but rather from the ACSS administration's failure to confer the benefits (hours of work and hourly compensation) that Congress granted them in the 1978 amendment to 20 U.S.C. § 241(a). These non-discretionary benefits clearly fall within the scope of the Back Pay Act, as amended in 1978. The Court of Appeals' conclusion that the teachers' claims are not actionable under the Back Pay Act because "[t]hey only seek additional compensation," App. 4a, ignores the language of the Back Pay Act, the regulations promulgated thereunder, and the court's own precedent.

The erroneous notion of the Back Pay Act's scope is also evident in the same appellate court's opinion in *Hambsch v. United States*, 848 F.2d 1228 (Fed. Cir. 1988) (*Hambsch III*), upon which the Claims Court in the present case relied heavily. In the *Hambsch* court's view, even though an employee is wrongfully required to use his or her sick leave while recuperating from an injury suffered in the line of duty (and causing the employee to return to work before he or she is medically ready), this violation of the sick leave statute is not actionable under the Back Pay Act because it "would have no *pecuniary consequences* until the accrued sick leave was exhausted, which would never happen in many cases as the officer would return to duty first." *Id.* at 1231

(emphasis added). In other words, so long as the employee received pay during the recuperation period, the court was not concerned with the fact he had to use up all his accrued sick leave, in violation of the express terms of the sick leave statute. It is difficult to believe that Congress envisioned such a result when it enacted the Back Pay Act for the stated purpose of putting the employee "in the same position he would have been in had the unjustified or erroneous personnel action not taken place." S. Rep. No. 1062, 89th Cong., 2d Sess. 1 (1966), *reprinted in* 1966 U.S. Code Cong. & Ad. News 2097.

The Back Pay Act entitles employees to recover the "pay, allowances, or differentials" which they would have received but for the unwarranted personnel action. 5 U.S.C. § 5596(b)(1). The Office of Personnel Management's regulations implementing the Back Pay Act define "pay, allowances, and differentials" as "monetary and *employment benefits* to which the employee is entitled by statute or regulation[.]" 5 C.F.R. § 550.803 (emphasis added). The Act itself defines "personnel action" to include "failure to . . . confer a *benefit*." 5 U.S.C. § 5596 (b)(4) (emphasis added). This definition is carried forward in the regulations, along with the further clarifier that actions within the regulations' scope "include personnel actions and pay actions (alone or in combination)." 5 C.F.R. § 550.803.

Consistent with the statutory language, this Court has described the Back Pay Act as "extending the right to backpay and *lost benefits* to every employee affected by a personnel action subsequently found to be unjustified[.]" *Bush v. Lucas*, 462 U.S. 367, 385 n.25 (1983) (emphasis added). In barring the Act's application to reclassification cases, the Court in *United States v. Testan*, 424 U.S. 392 (1976), concluded that "the Back Pay Act, as its words so clearly indicate, was intended to grant a monetary cause of action only to those who were subjected to

a reduction in their duly appointed *emoluments* or position." *Id.* at 407 (emphasis added). Most recently, and most succinctly, Justice O'Connor opined:

> . . . the Back Pay Act itself is an explicit consent to suit by the United States as to a claim by a federal employee that the pay *or emoluments* of his or her position have been wrongfully withheld in violation of an "applicable law, rule, regulation, or collective bargaining agreement."

Hambsch v. United States, 109 S. Ct. at 1971 (emphasis added).

In the present case, recognition of the Back Pay Act's applicability to non-pay benefits means that the ACSS teachers have stated a cause of action based solely on violations of the "hours of work" provision of 20 U.S.C. § 241(a). It is unnecessary for the Claims Court to find that the statute expressly grants the right to additional pay for the additional hours of work, especially given that § 241(a) in no way limits the teachers' compensation to the *annual* pay received by District of Columbia teachers. Indeed, even without the Back Pay Act, the teachers have stated a cause of action based on traditional principles of implied statutory remedies.

F. THE COURT OF APPEALS ACCORDED NO SIGNIFICANCE TO THE COLLECTIVE BARGAINING AGREEMENT OR THE TUCKER ACT'S CONTRACT CLAUSE.

The Court of Appeals' rejection of the teachers' claims for breach of the collective bargaining agreement was based on an interpretation of the Tucker Act contract clause which would render it, too, a nullity. Again, in its relentless preoccupation with eschewing jurisdiction, the Court of Appeals has left the teachers without a remedy, notwithstanding Congress' express consent and the precedent of this Court. (The court also ignored the

Back Pay Act's express consent to suit for breaches of collective bargaining agreements).[4]

The teachers' collective bargaining agreement with ACSS, which the Navy considered effective throughout the period in question, specifically provided that all matters covered by the agreement were to be administered in accordance with "existing or future laws[.]" *Franco*, 15 Cl. Ct. at 288; App. 15a. By incorporating provisions of law into the terms of the contract, ACSS thus covenanted to provide "compensation, tenure, leave, hours of work, and other incidents of employment on the same basis as provided for similar positions in the public schools of the District of Columbia." 20 U.S.C. § 241(a).

Apart from claims founded upon an Act of Congress, the Tucker Act also grants Claims Court jurisdiction over causes of action founded upon "any express or implied with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491 (a)(1). In this case, the teachers' claims are founded upon an *express* contract which obligated ACSS to provide compensation and hours of work on the same basis as that received by D.C. teachers. The remedy for ACSS' material breach of the express contract is money damages based on traditional principles of contract law, an entirely separate inquiry from the statutory analysis of whether § 241(a) and/or the Back Pay Act grant the teachers a monetary cause of action.

The Court of Appeals blithely disregarded this fundamental distinction when it held that "[i]f section 241(a) does not entitle appellants to additional pay, they cannot state a claim for damages upon a contract requiring com-

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[4] ACSS' refusal to comply with the compensation and hours of work provisions of § 241(a) constitutes another form of "unjustified or unwarranted personnel action" under the Back Pay Act, which also gives Congress' consent to suit based on the terms of a "collective bargaining agreement" as defined in 5 U.S.C. § 7103. 5 U.S.C. §§ 5596(b)(1) and (4).

pliance with that very same statutory provision." App. 4a. Clearly this is not a logical or valid proposition; the parties can agree on any standard of conduct they wish, referring to a statute as a shorthand method of describing the standard of conduct, and yet agree on non-statutory remedies that will be available to enforce that standard.

In support of its unreasoned conclusion, that the contract remedies must be co-extensive with the statutory ones, the court again (mis-)cited only a single case, *Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728 (1982). A close reading of that case, however, demonstrates that not only is it factually distinguishable from the present one, but the Supreme Court's analysis directly supports the teachers' theory of recovery.

Sheehan was an employee of a nonappropriated fund instrumentality who was discharged after being convicted of several drug possession offenses in South Carolina. *Sheehan*, 456 U.S. at 730. On appeal from the district court's summary dismissal, Sheehan successfully argued that certain AAFES regulations formed part of an *implied-in-fact contract*, and that violations of those regulations were tantamount to a breach of contract cognizable under the Tucker Act. *Id.* at 733. In reversing, this Court prudently recognized that if personnel regulations automatically gave rise to implied-in-fact contracts, then any alleged violation of a regulation would bring employees' claims under the Tucker Act, even if such claims were expressly prohibited under the Back Pay Act. *Id.* at 740-41.

The *Sheehan* Court recognized that the Tucker Act supplies the requisite explicit waiver of sovereign immunity for contract suits against the United States. *Id.*, 456 U.S. at 734. The Court further recognized that the Tucker Act contract clause applies to suits "premised upon an employment contract, as well as on one for goods or other services." *Id.* at 735, *citing United States v.*

Hopkins, 427 U.S. 123, 126 (1976). In a footnote, the Court went on to explain how Sheehan's claims differed from other contract claims which have been upheld by the courts. *Sheehan*, 456 U.S. at 739 n.11.

The Court first observed that because Sheehan's case was not based on regulations which promised the payment of money, Sheehan's case was distinguishable from other cases "where contracts were inferred from regulations promising payment." *Id.*, 456 U.S. at 739 n.11. This is undoubtedly the aspect of the *Sheehan* holding on which the Court of Appeals intended to rely in the present case. *See* App. 4a. However, the present case does not involve inferring a contract—the ACSS teachers' claims are based on an express contract.

Distinguishing Sheehan's claims from ones founded upon an express contract, the Court stated:

> Because respondent has not demonstrated that the parties entered into an express contract, this case is also different from those where regulations were considered an implied part of an express contract. See *Bodel v. Department of Treasury, Bureau of Public Debt*, 532 F.2d 277, 279 n.7 (CA2), *cert. denied*, 429 U.S. 849 . . . (1976); *Wolak v. United States*, 366 F. Supp. 1106, 1110 (D. Conn. 1973); . . .

Sheehan, 456 U.S. at 739 n.11. As indicated by the Court, Tucker Act contract jurisdiction was upheld in the latter two cases even though the regulations did not mandate the payment of money. *Bodel*, 532 F.2d at 279 n.7; *Wolak*, 366 F. Supp. at 1110-12. Both cases involved Treasury Department regulations that were construed as forming part of the contracts between the United States and the purchasers of its bonds.

In the present case, the teachers' claims are even more solidly based than the cases cited approvingly in *Sheehan*. Not only can the ACSS teachers point to an express contract, but that contract in turn expressly incorporated

relevant provisions of law into its terms. Clearly, the 1978 amendment to 20 U.S.C. § 241(a) was such a relevant provision of law, since it was enacted in direct response to the ACSS teachers' congressional testimony. Thus, even if 20 U.S.C. § 241(a) can somehow be interpreted as not promising the money which the teachers here seek, ACSS' undisputed breach of the contract's "hours of work" provision is nevertheless actionable for contract damages under the Tucker Act.

CONCLUSION

This case raises a number of issues of far-reaching importance concerning the power of the Claims Court to award damages for the violation of federal personnel statutes. The following questions either have been decided by the Federal Circuit Court of Appeals in ways which apparently conflict with the applicable decisions of this Court, or have not been, but should be, settled by this Court:

(1) Is the Back Pay Act limited to enforcement of "money mandating" statutes, or is it intended also to authorize recovery of the monetary equivalent of employment benefits which are essentially economic in nature?

(2) Apart from the Back Pay Act, is the *Anderson* test appropriate for determining when an employment (or other) statute "can fairly be interpreted" to authorize, of its own force, damages for its violation?

(3) Does the Tucker Act authorize contract damages for the breach of a collective bargaining agreement, when the agreement incorporates a standard of conduct prescribed by statute or regulation which itself may not impliedly mandate the payment of money?

On behalf of the teachers who are covered by 20 U.S.C. § 241(a), on behalf of other federal employees who seek the protection of the Back Pay Act, and on behalf of all persons who suffer injury from violations by the execu-

tive branch of express mandates of Congress, the petitioners beseech this Court of last resort to review their case and thereby to correct the erroneous jurisdictional doctrines of the Claims Court and the Federal Circuit.

Respectfully submitted,

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September 11, 1989

APPENDIX

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

89-1012

BENJAMIN FRANCO, PAUL TRITTSCHUH II, RANDY MINTZ, BRENDA FERRER, ABRAHAM APONTE, THOMAS YEAGER, LILY ORTIZ, JAMES KEECH, LINN WALLACE, JUDY SHOLY and SCEPTER, INC., for themselves and on behalf of all others similarly situated,

Plaintiffs-Appellants,

and

RASHID ABDUR-RAHMAN, MARJORIE ADAMS, LAWRENCE ALBERT, NOEMI ALCAIDE, DIANE K. AMMONS, RUTH ANDREWS, JUANITA ANGUERIA, NORA ARIAS AVILA, ANN BARRON, BETTE BENDER, HELEN BERAZA, SUSANNAH BENSON, DOLORES BIELECKI, IRIS BLAND, ROBERT BLAND, SYDNEY BURSET, GREGORY BUSH, ZAIDA CACHO, JOAN CAMPBELL, NAOMI DAFINI CORBIN, AMALIA CARRASQUILLO, VICTOR CASTRO, JOSEPH CHERRY, JACQUELINE BARTER CLARK, SHARON L. CRANE, CARMEN COLBERG, HOWARD CONWAY, AIDA CORIANO, CYNTHIA COSTA, DELIA COSTA, NOEL COSTA, LAURIE CRESPO, ESPERANZA ESCOBAR DADAIAN, JEAN DAVIS, DELIA DECORRAL, AIDA DE LA MATTA, MARIA RODRIGUEZ DEYEAGER, THOMAS DODD, MAXINE EDMISTEN, RUTH ELBERSON, CARL ENGEBRETSON, HECTOR FRANCO, HECTOR GARCIA, LULDES GIRAUD, THELMA GORNEY, VIRGINIA GOYANES, GLORIA GOYTIA, GERSON GURELL, PEGGY HALPERN, ANDERLYN HARRISON, MARCIA HELLMOLD, ELIZABETH HENNIG, MYRON HERRICK, JOSEFINA HIGUERA-PEREDA, ELAINE HINMAN, WILMA HOCKING, CAROL HOLLAND, MERLIN HOWELL, MARIA JAMES,

WAYNNA LAURA JAMES, NANCY JANOSON, ELIZABETH JENKINS, ABBY JENSEN, GORDON JOHNSON, NATHALIE JOY JUSTICIA, MARIANNE KAVANAUGH, DORIS KEECH, AUDREY KRISS, JOHN LADD, PAULA LADD, JOSEPH LAFRAMBOISE, ANNE LATHAM, NANCY LEE, FRANCIS LEWIS, MARIA E. LIPUSCEK, JOHANNA LOPEZ, ALMA LUKE, EILEEN MACMACKIN, AWILDA MALDONADO, NILDA MALDONADO, ISIS MARTINEZ, JOYCE BRYAN MARZULLO, JAMES MCALLISTER, MARIA MCCURDY, GRANT MCFERON, NANCY MCHARG, ROBERSON MCKINNEY, JAMES MERRICK, FREDERICK MILLER, JANET KONCICK MINTZ, PAULINE MIRANDA, BARBARA MITCHELL, GLADYS MONTALVO, GLORIA MONTALVO, MARGOT MOSKONAS, EDNA NEGRON, ROBERTO NEGRON (ESTATE), GWEN NEGRON, ELIZABETH NIEVES, FRANCES NOCHERA, BERNADETTE O'BRIEN, JACK O'LEARY, SARA OLIVENCIA, PEGGY C. OLIVER, TONILEE OLIVERIO, FLOYD OLSON, SOCORRO ORTIZ, HENRY OTERO, VALERIE OWEN, CARL PACHUCKI, BONNIE PALMER-GOVERO, LINDA PARKER, VINCE PARTON, DORIS PATRIDGE, ELIZABETH PAWSON, ANTOINETTE TORRES PEREZ, LAURA PEREZ, DONALD PETERS, PAMELA PORTER, NICOLAS QUINONES-COLL, DAVID O. QUINTIN, ERLE RAMSEY, IGNACIO REINOSA, HERBERT RIEN, JEAN RIEN, SHIRLEY RILEY, WILLIAM RIMEL, CARMEN RIVERA, LILLIAN M. RIVERA, YOLANDA RIVERA, NADJA ROBINSON, JEAN RODRIGUEZ, ANN ROETTGER, HERALD ROETTGER, JR., NILDA ROMAN, ROBERTO ROSALES, LAVERNE JEAN RUIZ, CLIFTON RUSH, MARY ANN RUSH, CELESTINO SANTIAGO, DAISY C. SCHNEIDER, HERSCHEL SESSIONS, JEROME SICINSKI, DORIS SIERRA, FRANK SMITH, MAXINE SMITH, THERESA A. SMITH, MARY SMOLEN, GEORGE G. SNYDER, MARK SODERBERG, JOSE SOLIS, JR., LYNDA SOUTHWORTH, KAREN SPURGEON, MARILYN STALZER, GUADALUPE SUMNER, EVELYN SWITZER, SANDRA SWITZER, HELEN SZCZESNIAK, CATHLEEN TORRES, ELLYHA TORRES, ALICE URBIZTONDO, JERRY VAN BUREN, SANTOS VAZQUEZ, JULIE WALLACE, LEE WALSH, RICHARD WILBUR WASH-

BURN, SHARON WEIDLEIN, STEPHEN WEIDLEIN, MILTON H. WEISS, JOHN WELLS, JOHN WHITE, LYNN WHITE, PAMELA A. WOODARD, ISABEL WILLIAMS, MARTHA JANE WILLIAMS, LUCY WILSON, PAMELA WILSON and VIRGINIA WOOLLIS,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

Decided: May 16, 1989

Before MARKEY, *Chief Judge*, NEWMAN and ARCHER, *Circuit Judges.*

ARCHER, *Circuit Judge.*

DECISION

Appellants, employees of the Antilles Consolidated School System in Puerto Rico, appeal the summary judgment of the United States Claims Court, *Franco, et al. v. United States*, 15 Cl.Ct. 283 (1988), dismissing their claims for additional pay based on 20 U.S.C. § 241(a) (1982), the Back Pay Act and/or their collective bargaining agreement. We *affirm.*

OPINION

None of the claims for relief stated in the appellants' complaint is sufficient to invoke the Claims Court's Tucker Act jurisdiction. It is undisputed, and the Claims Court so found, that appellants received for the years at issue "compensation equal to that of comparable [District of Columbia public school] personnel" to which their pay is linked by 20 U.S.C. § 241(a), *Franco*, 15 Cl.Ct. at 284. Appellants are, therefore, not entitled to

additional compensation under section 241(a), even though their hours of work may have exceeded those of comparable D.C. public school teachers. *Cf. Begay v. United States*, 865 F.2d 230 (Fed. Cir. 1988) (holding that the statutory entitlement to monies under 25 U.S.C. § 640(d) (1982) was a ceiling with respect to the Claims Court's Tucker Act jurisdiction). The proper form of relief to address appellants' injury is not the payment of money damages but an adjustment in the hours they are required to work. Such a remedy, however, is beyond the jurisdiction of the Claims Court.

Similarly, the Back Pay Act cannot be availed of here because the alleged unwarranted personnel action has not "resulted in the withdrawal or reduction" of appellants' pay. They seek only additional compensation. *See* 5 U.S.C. § 5596(b)(1) (1982 & Supp. V 1987).

Appellants also argue that the government is liable for damages based on their collective bargaining agreement. That agreement, however, does not impose any greater fiscal obligation on the government than section 241(a). If section 241(a) does not entitle appellants to additional pay, they cannot state a claim for damages upon a contract requiring compliance with that very same statutory provision. *Cf. Army & Air Force Exchange Service v. Sheehan*, 458 U.S. 728, 739-40, (1982) (contract implied from employment regulations cannot support a Tucker Act claim against the United States where the regulations alone do not support jurisdiction).

NEWMAN, *Circuit Judge*, concurs in result.

IN THE UNITED STATES CLAIMS COURT

No. 388-86C
No. 101-88C

(Filed: August 16, 1988)

BENJAMIN FRANCO, *et al.*,
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

RASHID ABDUR-RAHMAN (1), *et al.*,
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

Jurisdiction—20 U.S.C. § 241(a): Statute providing for federally-employed school personnel residing outside the United States to receive same "compensation, tenure, hours of work and other incidents of employment" as District of Columbia school personnel does not authorize money damages to plaintiffs who received same yearly compensation but worked longer hours than District of Columbia counterparts.

Robert G. Mullendore, attorney of record for plaintiffs, and *Michael H. Rorick*, of counsel.

Stephen J. McHale, with whom were *Acting Assistant Attorney General James M. Spears*, *David M. Cohen*, and *Robert Reutershan* for defendant. *Susan Warshaw*, Department of Navy, of counsel.

OPINION

WIESE, *Judge.*

Title 20 of the United States Code, section 241(a) (1982), directs the Secretary of Education to arrange for the free public education of children residing on Federal property when such education is not otherwise made available to them through agencies of the host state or local community. In the discharge of this duty, the Secretary is authorized to hire personnel, and, in the case of such personnel employed outside the continental United States, Alaska and Hawaii, section 241(a) specifies they "shall receive such compensation, tenure, leave, hours of work, and other incidents of employment on the same basis as provided for similar positions in the public schools of the District of Columbia."

The question that comes up in this case is whether plaintiffs—employees of the Antilles Consolidated School System ("ACSS") in Puerto Rico and within the class of those favored by section 241(a)—may rely upon that statute to obtain compensation *in excess* of that paid for similar positions in the public schools of the District of Columbia based on the contention that they served a longer duty day than their District of Columbia counterparts. The claims are before the court as a demand for back pay presented through a motion for summary judgment. Defendant has cross-moved claiming, *inter alia*, that the statute does not authorize the monetary relief

which plaintiffs seek and, therefore, that the court is without jurisdiction. We agree with defendant's position.

I

The named plaintiffs are teachers and other non-supervisory professional personnel employed by the United States within the Antilles Consolidated School System—a subordinate agency of the United States Navy. The ACSS is responsible for the education of children of United States personnel stationed at various military bases in Puerto Rico. At all times relevant to this suit, plaintiffs received an annual compensation equal in dollar amount to that provided to similar positions in the District of Columbia Public Schools ("DCPS"). As indicated, the present litigation involves plaintiffs' contention that, while the compensation they received was equal to that of comparable DCPS personnel, their hours of work were not.

Defining "hours of work" as time spent on duty and at the job site, plaintiffs maintain that between October 1, 1978 and the beginning of the 1982-83 school year, they worked, on average, one hour per day more than their District of Columbia counterparts, and, between the beginning of the 1982-83 school year and 1986, they claim their daily work schedule averaged 45 minutes longer. They also say that, throughout this time period (1978-1986), they had a duty free lunch period that was fifteen minutes shorter than in D.C. Finally, they contend that, beginning with the 1983-84 school year, they did not enjoy the same amount of before and after school preparation time as the DCPS.

Plaintiffs maintain that these differences in the length and content of the instructional day are transgressions of the command set out in 20 U.S.C. § 241(a) which, as we have noted, requires that educational personnel such as plaintiffs receive "compensation, tenure, leave, hours of work, and other incidents of employment on the same

basis as provided for similar positions in the public schools of the District of Columbia." The contention is that, pursuant to this language, plaintiffs are entitled to unequivocal alignment between all quantifiable aspects of their own positions and those of their counterparts in the District of Columbia school system. Based on this reading of the statute, plaintiffs now seek extra compensation for the extra time worked. Say the plaintiffs: "while this Court cannot make plaintiffs truly whole for the additional hours of work that were improperly required of them, the Court can at least remedy the correlative wrong of inadequate compensation."

The Government begins its argument on this last note. Without conceding any of the plaintiffs' factual contentions regarding the claimed disproportion in hours worked, the Government asserts that the claims, even if true, cannot be redressed in this court. The court is said to lack jurisdiction over the matter because the statute on which plaintiffs base their claims, 20 U.S.C. § 241 (a), does not authorize the entry of a money judgment against the United States in plaintiffs' favor for any sums beyond their basic entitlement to annual compensation measured at the rates prevailing in the District of Columbia. And since plaintiffs' demands are basically ones for more money based on more work, the claims go beyond what the statute authorizes and therefore what the court may enforce by money judgment.

II

It is fundamental to this court's jurisdiction that, in order to sue here for money, the law, statute or regulation on which the demand is based must unequivocally demonstrate the Government's intention to provide a monetary benefit or to allow a monetary remedy in redress of an injury to a protected right. *United States* v. *Testan*, 424 U.S. 392, 398, 400 (1976), *Bowen* v. *Massachusetts*, 487 U.S. ——, —— n.31 (1988). "Under Sec-

tion 1491 what one must always ask is whether the constitutional clause or the legislation which the claimant cites can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Eastport Steamship Corp.* v. *United States*, 178 Ct. Cl. 599, 607, 372 F.2d 1002, 1009 (1967).

Plaintiffs maintain that the requirements for our jurisdiction are satisfied in this case. In support of this position they say that, given the statute's mandate for equality of treatment between their positions and those of like responsibility in the DCPS, it follows that "additional compensation is obviously contemplated for additional hours of work." In other words, the argument is that even though Section 241(a) does not explicitly direct that additional compensation be paid for extra hours worked, nevertheless the authority for such a result may fairly be inferred from the basic purpose Congress had in mind in the enactment of the statute. To buttress the point they rely on a number of decisions, chief among these being *United States* v. *Mitchell*, 463 U.S. 206 (1983) and *Anderson* v. *United States*, 5 Cl. Ct. 573 (1984), *aff'd* 764 F.2d 849 (Fed. Cir. 1985). In our view, neither case is helpful to plaintiffs' position.

To consider first the *Mitchell* decision, that suit involved a claim for damages by the allottees of the Quinault Indian Reservation. One of the two principal issues raised in the case was whether plaintiffs—Indian beneficiaries of a statutory trust—had a right to pursue monetary relief against the United States for mismanagement of their forest resources by the Secretary of the Interior in the abence of an explicit recognition of such a right in the governing statutes. In deciding that question in the Indians' favor, the Court made the observation —now relied on by the plaintiffs—that "[t]he recognition of a damages remedy also furthers the purposes of the statutes and regulations, which clearly require that the Secretary manage Indian resources so as to generate pro-

ceeds for the Indians." *Id.* at 226-27. The Court also noted that "'[a]bsent a retrospective damages remedy, there would be little to deter federal officials from violating their trust duties, at least until the allottees managed to obtain a judicial decree against future breaches of trust.'" *Id.* at 227 (citation omitted). As indicated, plaintiffs offer this language as instructive on the issue whether Section 241(a) may be read as embodying a right to additional compensation to remedy a breach of the statute's requirement for equal hours.

The argument is not convincing. A reading of the *Mitchell* decision in its entirety makes it clear that the critical determinant in the Court's recognition of a damage remedy was not the analysis reflected in the language plaintiffs have cited. Rather, it was the existence of the trust relationship that determined the result. From that relationship, said the Court, the right to sue the trustee for damages for breach of trust "naturally follows." *Id.* at 226. Or, as the Court had also put it, it is a right that is included as a "fundamental incident" of the trust relationship. It is this language then that marks the essence of the *Mitchell* ruling. By contrast, what plaintiffs have cited is just make-weight—language supportive of the conclusion but not controlling in its own right. In short, that language does not provide a rule for determining when a damage remedy may properly be inferred.

The same is true of the other case on which plaintiffs rely, *Anderson* v. *United States*, 5 Cl. Ct. 573 (1984), *aff'd*, 764 F.2d 849 (Fed. Cir. 1985). At issue in *Anderson* were claims by certain construction workers employed by the Government as "intermittent," "temporary" or "term" employees, seeking recovery of the monetary equivalent of sick leave, annual leave, health and life insurance benefits, per diem allowances and the rates of pay they would have received as prevailing rate employees. The court denied the claims based on the finding that plaintiffs were not members of the statutory class

entitled to the benefits being claimed and, further, that the court lacked the power to order their reclassification so as to bring them within that class.

In the course of deciding the issue, the court noted that the result would have been different, that is, plaintiffs would have been entitled to the monetary equivalent of the benefits they claimed, had those benefits been unlawfully denied them in the first instance. As the court reasoned it, the Constitution, a statute, or a regulation should be "fairly interpreted as mandating compensation" when a statute confers a benefit that is economic in nature and the Government breaches its duty to confer that benefit. 5 Cl. Ct. at 577. Plaintiffs rely on this reasoning, and the affirmance of the *Anderson* decision on appeal, as confirming their right to monetary relief in the present case. The argument is not persuasive.

To start with, the court of appeal's affirmance of the *Anderson* decision should not be taken as imparting any special significance to the language plaintiffs rely on. Not only was that language not essential to the holding but, more than once, the Federal Circuit has cautioned litigants that it reviews "judgments, not statements in opinions." *Fogarty* v. *United States*, 780 F.2d 1005, 1013 (Fed. Cir. 1986); *Stratoflex, Inc.* v. *Aeroquip Corp.*, 713 F.2d 1530, 1540 (Fed. Cir. 1983).

Second, the wisdom of adhering to these words of caution is borne out by the fact that the standard for determining the existence of a monetary remedy that was proposed by the trial court in *Anderson* has never found favor with the Federal Circuit. Indeed, it would be fair to say that the language has been impliedly rejected by the Federal Circuit.[1]

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[1] During the oral argument of this case, plaintiffs also referred the court to the decisions in *Barber* v. *United States*, 676 F.2d 651 (Ct. Cl. 1982) and *Kelly* v. *United States*, 826 F.2d 1049 (Fed. Cir. 1987); the contention being that, in these two decisions, the court provided a monetary remedy where none was expressed in the

The case that urges this conclusion is *Hambsch* v. *United States*, 848 F.2d 1228 (Fed. Cir. 1988). Hambsch was an employee of the Uniformed Division of the United States Secret Service who sued in the Claims Court for lost wages based on the claim that he had been unlawfully denied administrative leave (*i.e.*, leave not chargeable to either sick or accrued leave) during the period of his recuperation from alleged job-related disabilities. His lost wages claim included the value of the sick leave and accrued leave that he exhausted as well as his days of leave without pay. The Claims Court entered a summary judgment of dismissal based on its review of the record and its determination that the agency's denial of administrative leave had not been arbitrary, capricious, or without the support of substantial evidence.

An appeal was taken and there the focus of the litigation changed. In the Federal Circuit's view of the case, the issue was not whether the Claims Court had correctly decided the merits of the matter but whether it had jurisdiction to decide the question at all. And the conclusion reached was that the Claims Court did not have jurisdiction because plaintiff's cause of action was not based on a money-mandating statute. The analysis that led to this conclusion is instructive here.

Hambsch's suit in the Claims Court was grounded on a statute, 5 U.S.C. § 6324 (1982), which states in per-

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governing statute. We have examined these decisions and do not find them at all on point. Both cases deal with the same question: whether a military member's surviving spouse has a right to a survivor's annuity under 10 U.S.C. § 1448(a) (1982), the Survivor Benefit Plan, when, during the member's lifetime, notice of his election against providing for a survivor's annuity was not given to the affected spouse. The holding in both cases is to the effect that, absent compliance with the statutory notice requirement, a service member's election is a nullity; hence the surviving spouse *retains* the annuity entitlement provided under the statute. *Barber* at 654, 657; *Kelly* at 1052. Far from *implying* a right to monetary damages, these decisions do no more than *preserve* a statutory entitlement to money.

tinent part that: "(a) Sick leave may not be charged to the account of a member of the . . . [Uniformed Division] for an absence due to injury or illness resulting from the performance of duty." In deciding whether a violation of the statute was redressable through monetary damages, the court began by noting that a basic principle of Tucker Act jurisdiction under Section 1491 is that "the consent of Congress to suit on any class of claim 'cannot be implied but must be unequivocally expressed.'" 828 F.2d at 1230 (quoting *United States* v. *Testan*, 424 U.S. 392, 399 (1976)). In applying this principle to the statute in question, the court observed that section 6324 was phrased in the negative—"sick leave may not be charged" for a job-related absence or injury—a wording which the court said "may indicate an intent to create a liability for back pay for violation, but it is hard to say it does so 'unequivocally.' It may be written the way it is to *avoid* creating any affirmative entitlement." *Id.* at 1231 (underscoring original). The court further noted that section 6324 was part of a statute whose primary concern was the establishment of a suitable sick leave system for certain police and firemen—one that prevented the use of sick leave for line-of-duty injuries. Based on the language of the statute and its purpose, the court concluded that Congress had not "unequivocally expressed" an intent to create a retroactive liability in money damages for placing a police officer on sick leave when he should have been placed on administrative leave.

Adhering to the analysis in *Hambsch*, we are compelled to conclude that in this case too Congress has not unequivocally expressed its consent to permit a monetary remedy for violations of 20 U.S.C. § 241(a) (1982). The statute, plaintiffs say, calls for unequivocal alignment between their own positions and their District of Columbia counterparts as to all quantifiable aspects of the employment relationships. Thus, not only is their compensation to be on the same basis, but so too their "tenure," "leave," "hours of work" and "other incidents of em-

ployment." Therefore, if the argument holds that a disparity in hours may be redressed through a money judgment, then so also would a disparity in tenure, leave and other incidents of employment be redressable in the same manner.

However, nothing in the text of the statute would permit the court to read into it a broad mandate for enforcement by money judgment. Indeed, the more logical inference to be drawn here is that, in specifying identity in all employment incidents, Congress intended that the statute be enforced according to its terms rather than through the allowance of money damages offered in substitution of statutory rights. To put it another way, the statute's insistence upon equality in hours of work and other incidents of employment—rather than just equality in pay—expresses an emphasis demanding literal enforcement of the law. Consequently, adherence to the legislative scheme requires that plaintiffs seek specific relief to remedy an imbalance in hours of work rather than press here with what essentially amount to overtime claims.

Nothing in the legislative history which plaintiffs have cited points to a different conclusion. The relevant congressional report, H.R. No. 95-1137, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code & Ad. News 4971, 5076-5078 explains that the statutory language in question was proposed by members of the Antilles Consolidated Teacher Association to overcome a deficiency in existing law which, the report declares, "invites abuse by not specifying personnel practices, especially regarding salary." *Id.* at 5078. The report goes on to say that "[a]s a consequence of this testimony [from the teachers' association], the Committee has adopted an amendment [the language now in question] making clear that the compensation, tenure, leave, hours of work and other incidents of employment for personnel in school systems outside of the 50 states must be on the same basis as that provided in the public schools of the District of Columbia." *Id.*

This language does no more than repeat the statutory text and neither source permits this court to say that Congress intended Section 241(a) to include a cause of action for money damages even though no such right was expressly provided. Absent an affirmative indication that Congress intended the statute to be self-enforcing, *i.e.*, that a right to damages should flow from its breach, we must read the law "with that conservatism which is appropriate in the case of a waiver of sovereign immunity." *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941).

Since we hold that plaintiffs do not have a right to command the payment of money under 20 U.S.C. § 241 (a), it adds nothing to their case to say that their claims are also founded on the Back Pay Act, 5 U.S.C. § 5576 (b) (1982). As explained in *Spagnola* v. *Stockman*, 732 F.2d 908, 912 (Fed. Cir. 1984), the Back Pay Act is merely derivative in application and is not in itself a jurisdictional statute. "Unless some other provision of law commands payment of money to the employee for the 'unjustified or unwarranted personnel action,' the Back Pay Act is inapplicable."

Similarly unavailing is plaintiffs' further contention that their claims for added pay are actionable here as a suit for breach of contract. They reason to this end by saying that, under the terms of the collective bargaining agreement to which they were subject, the Antilles Consolidated School System had agreed to administer all matters covered by the agreement in accordance with "existing or future laws" and hence in accordance with the requirements of Section 241(a). This agreement having been breached—so the argument goes—plaintiffs may therefore recover contract damages for the injury sustained.

Their argument is based on an erroneous legal premise. We have held that the statute cannot be fairly interpreted as mandating a monetary remedy for its breach. It necessarily follows that Congress, by not writing the statute

so as to allow money damages, has thereby acted to prohibit such relief. It is not within the province of the Navy (as the agency under whose aegis the ACSS operates) to change that result by contract. The issue is one of authority. The relinquishment of sovereign immunity —the ultimate issue at stake in any case involving a monetary demand that is to be satisfied from appropriated funds—requires the express consent of the Congress. *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654, 658-660 (1947).

CONCLUSION

For the reasons given, defendant's cross-motion for summary judgment is granted. The clerk shall enter judgment dismissing the complaints.

IN THE UNITED STATES CLAIMS COURT

No. 388-86 C
101-88 C

BENJAMIN FRANCO, *et al.*

v.

THE UNITED STATES

JUDGMENT

[Filed Aug. 17, 1988]

Pursuant to the opinion of August 16, 1988, directing dismissal of the complaints,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaints are dismissed, with costs to the prevailing party.

FRANK T. PEARTREE
Clerk of Court

By: /s/ Linda A. Eddins
Deputy Clerk

August 17, 1988

NOTE: As to appeal, 60 days from this date, see RUSCC 72. Effective May 1, 1987, RUSCC 77(k)(2) is amended to read:

"Filing Notice of Appeal....$105.00 (includes $5.00 fee for notice of appeal and $100.00 Court of Appeals filing fee)".

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

89-1012

BENJAMIN FRANCO, PAUL TRITTSCHUH II, RANDY MINTZ, BRENDA FERRER, ABRAHAM APONTE, THOMAS YEAGER, LILY ORTIZ, JAMES KEECH, LINN WALLACE, JUDY SHOLY and SCEPTER, INC., for themselves and on behalf of all others similarly situated,

Plaintiffs-Appellants,

and

RASHID ABDUR-RAHMAN, MARJORIE ADAMS, LAWRENCE ALBERT, NOEMI ALCAIDE, DIANE K. AMMONS, RUTH ANDREWS, JUANITA ANGUERIA, NORA ARIAS AVILA, ANN BARRON, BETTE BENDER, HELEN BERAZA, SUSANNAH BENSON, DOLORES BIELECKI, IRIS BLAND, ROBERT BLAND, SYDNEY BURSET, GREGORY BUSH, ZAIDA CACHO, JOAN CAMPBELL, NAOMI DAFINI CORBIN, AMALIA CARRASQUILLO, VICTOR CASTRO, JOSEPH CHERRY, JACQUELINE BARTER CLARK, SHARON L. CRANE, CARMEN COLBERG, HOWARD CONWAY, AIDA CORIANO, CYNTHIA COSTA, DELIA COSTA, NOEL COSTA, LAURIE CRESPO, ESPERANZA ESCOBAR DADAIAN, JEAN DAVIS, DELIA DECORRAL, AIDA DE LA MATTA, MARIA RODRIGUEZ DEYEAGER, THOMAS DODD, MAXINE EDMISTEN, RUTH ELBERSON, CARL ENGEBRETSON, HECTOR FRANCO, HECTOR GARCIA, LULDES GIRAUD, THELMA GORNEY, VIRGINIA GOYANES, GLORIA GOYTIA, GERSON GURELL, PEGGY HALPERN, ANDERLYN HARRISON, MARCIA HELLMOLD, ELIZABETH HENNIG, MYRON HERRICK, JOSEFINA HIGUERA-PEREDA, ELAINE HINMAN, WILMA HOCKING, CAROL HOLLAND, MERLIN HOWELL, MARIA JAMES, WAYNNA LAURA JAMES, NANCY JANOSON, ELIZABETH

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H. WEISS, JOHN WELLS, JOHN WHITE, LYNN WHITE, PAMELA A. WOODARD, ISABEL WILLIAMS, MARTHA JANE WILLIAMS, LUCY WILSON, PAMELA WILSON and VIRGINIA WOOLLIS,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

JUDGMENT

ON APPEAL from the United States Claims Court in CASE NO(S). 388-86C and 101-88C

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

Affirmed.

ENTERED BY ORDER OF THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Dated May 16, 1989

Costs: Against, Appellants.

Printing.....$166.00

Total.....$166.00

Issued as a Mandate: June 20, 1989

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

89-1012

BENJAMIN FRANCO, PAUL TRITTSCHUH II, RANDY MINTZ, BRENDA FERRER, ABRAHAM APONTE, THOMAS YEAGER, LILY ORTIZ, JAMES KEECH, LINN WALLACE, JUDY SHOLY and SCEPTER, INC., for themselves and on behalf of all others similarly situated,

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H. WEISS, JOHN WELLS, JOHN WHITE, LYNN WHITE, PAMELA A. WOODARD, ISABEL WILLIAMS, MARTHA JANE WILLIAMS, LUCY WILSON, PAMELA WILSON and VIRGINIA WOOLLIS,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

ORDER

[Filed June 13, 1989]

Before MARKEY, Chief Judge, NEWMAN, Circuit Judge, and ARCHER, Circuit Judge.

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

The mandate will issue on June 20, 1989.

FOR THE COURT,

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Dated: June 13, 1989

cc: MICHAEL H. RORICK
STEPHEN J. MCHALE

FRANCO V US, 89-1012

STATUTES INVOLVED

28 U.S.C. § 1491(a)(1) (1982)

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

§ 20 U.S.C. § 241(a) (1982)

§ 241. Education of children where local agencies cannot supply facilities

(a) Necessary arrangements by Secretary; standard of education

In the case of children who reside on Federal property—

(1) if no tax revenues of the State or any political subdivision thereof may be expended for the free public education of such children; or

(2) if it is the judgment of the Secretary, after he has consulted with the appropriate State educational agency, that no local educational agency is able to provide suitable free public education for such children,

the Secretary shall make such arrangements (other than arrangements with respect to the acquisition of land, the erection of facilities, interest, or debt service) as may be necessary to provide free public education for such children. Such arrangements to provide free public education may also be made for children of members of the Armed Forces on active duty, if the schools in which free public education is usually provided for such children are made unavailable to them as a result of official action by State or local governmental authority and it is the judgment of the Secretary, after he has consulted with the appropriate State educational agency, that no local educational agency is able to provide suitable free public education for such children. To the maximum extent practicable, the local educational agency, or the head of the Federal department or agency, with which any arrangement is made under this section, shall take such action as may be necessary to ensure that the education provided pursuant to such arrangement is comparable to free public education provided for children in comparable communities in the State, or, in the case of education provided under this section outside the continental United States, Alaska, and Hawaii, comparable to free public education provided for children in the District of Columbia. For the purpose of providing such comparable education, personnel may be employed and the compensation, tenure, leave, hours of work, and other incidents of the employment relationship may be fixed without regard to the Civil Service Act and rules and the following: (1) chapter 51 and subchapter III of chapter 53 of title 5; (2) subchapter I of chapter 63 of title 5; (3) sections 5504, 5541 to 5549, and 6101 of title 5; (4) sections 1302(b), (c), 2108, 3305(b), 3306(a)(2), 3308 to 3318, 3319(b), 3320, 3351, 3363, 3364, 3501 to 3504, 7511, 7512, and 7701 of title 5; and (5) chapter 43 of title 5. Personnel provided for under this subsection outside of the continental United States, Alaska, and Hawaii, shall receive such compensation, tenure, leave, hours of work,

and other incidents of employment on the same basis as provided for similar positions in the public schools of the District of Columbia. In any case where education was being provided on January 1, 1955, or thereafter under an arrangement made under this subsection for children residing on an Army, Navy (including the Marine Corps), or Air Force installation, it shall be presumed, for the purposes of this subsection, that no local educational agency is able to provide suitable free public education for the children residing on such installation, until the Secretary and the Secretary of the military department concerned jointly determine, after consultation with the appropriate State educational agency, that a local educational agency is able to do so.

5 U.S.C. § 5596 (1982 & Supp. V 1987)

§ 5596. Back pay due to unjustified personnel action

(a) For the purpose of this section, "agency" means—

(1) an Executive agency;

(2) the Administrative Office of the United States Courts;

(3) the Library of Congress;

(4) the Government Printing Office; and

(5) the government of the District of Columbia.

(b) (1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and

(ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, or under chapter 11 of title I of the Foreign Service Act of 1980, shall be awarded in accordance with standards established under section 7701(g) of this title; and

(B) for all purposes, is deemed to have performed service for the agency during that period, except that—

(i) annual leave restored under this paragraph which is in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limits prescribed by regulations of the Office of Personnel Management, and

(ii) annual leave credited under clause (i) of this subparagraph but unused and still available to the employee under regulations prescribed by the Office shall be included in the lump-sum payment under section 5551 or 5552(1) of this title but may not be retained to the credit of the employee under section 5552(2) of this title.

(2) (A) An amount payable under paragraph (1) (A) (i) of this subsection shall be payable with interest.

(B) Such interest—

(i) shall be computed for the period beginning on the effective date of the withdrawal or reduction involved and ending on a date not more than 30 days before the date on which payment is made;

(ii) shall be computed at the rate or rates in effect under section 6621 (a) (1) of the Internal Revenue Code of 1986 during the period described in clause (i); and

(iii) shall be compounded daily.

(C) Interest under this paragraph shall be paid out of amounts available for payments under paragraph (1) of this subsection.

(3) This subsection does not apply to any reclassification action nor authorize the setting aside of an otherwise proper promotion by a selecting official from a group of properly ranked and certified candidates.

(4) For the purpose of this subsection, "grievance" and "collective bargaining agreement" have the meanings set forth in section 7103 of this title and (with respect to members of the Foreign Service) in sections 1101 and 1002 of the Foreign Service Act of 1980, "unfair labor practice" means an unfair labor practice described in section 7116 of this title and (with respect to members of the Foreign Service) in section 1015 of the Foreign Service Act of 1980, and "personnel action" includes the omission or failure to take an action or confer a benefit.

(c) The Office of Personnel Management shall prescribe regulations to carry out this section. However, the regulations are not applicable to the Tennessee Valley Authority and its employees.

REGULATIONS INVOLVED

5 C.F.R. §§ 550.801-.807 (1988)

PART 550—PAY ADMINISTRATION (GENERAL)

Subpart H—Back Pay

AUTHORITY: 5 U.S.C. 5596(c).

SOURCE: 46 FR 58275, Dec. 1, 1981, unless otherwise noted.

§ 550.801 Applicability.

(a) This subpart contains regulations of the Office of Personnel Management to carry out section 5596 of title 5, United States Code, which authorizes the payment of back pay and reasonable attorney fees for the purpose of making an employee financially whole (to the extent possible) when, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance), the employee is found by an appropriate authority to have been affected by an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee. This subpart should be read together with this section of law.

(b) This subpart does not apply to any reclassification action.

§ 550.802 Coverage.

(a) Except as provided in paragraph (b) of this section, this subpart applies to employees, as defined in § 550.803 of this subpart.

(b) This subpart does not apply to—

(1) Employees of the government of the District of Columbia; and

(2) Employees of the Tennessee Valley Authority.

§ 550.803 Definitions.

In this subpart:

"Agency" has the meaning given that term in section 5596(a) of title 5, United States Code.

"Appropriate authority" means an entity having authority in the case at hand to correct or direct the correction of an unjustified or unwarranted personnel action, including (a) a court, (b) the Comptroller General of the United States, (c) the Office of Personnel Management, (d) the Merit Systems Protection Board, (e) the Equal Employment Opportunity Commission, (f) the Federal Labor Relations Authority and its General Counsel, (g) the Foreign Service Labor Relations Board, (h) the Foreign Service Grievance Board, (i) an arbitrator in a binding arbitration case, and (j) the head of the employing agency or another official of the employing agency to whom such authority is delegated.

"Collective bargaining agreement" has the meaning given that term in section 7103(a)(8) of title 5, United States Code, and (with respect to members of the Foreign Service) in section 1002 of the Foreign Service Act of 1980 (22 U.S.C. 4102(4)).

"Employee" means an employee or former employee of an agency.

"Grievance" has the meaning given that term in section 7103(a)(9) of title 5, United States Code, and (with respect to members of the Foreign Service) in section 1101 of the Foreign Service Act of 1980 (22 U.S.C. 4131). Such a grievance includes a grievance processed under an agency administrative grievance system established under Part 771 of this chapter.

"Pay, allowances, and differentials" means monetary and employment benefits to which an employee is entitled by statute or regulation by virtue of the performance of a Federal function.

"Unfair labor practice" means an unfair labor practice described in section 7116 of title 5, United States Code, and (with respect to members of the Foreign Service) in section 1015 of the Foreign Service Act of 1980 (22 U.S.C. 4115).

"Unjustified or unwarranted personnel action" means an act of commission or an act of omission (i.e., failure to take an action or confer a benefit) that an appropriate authority subsequently determines, on the basis of substantive or procedural defects, to have been unjustified or unwarranted under applicable law, Executive order, rule, regulation, or mandatory personnel policy established by an agency or through a collective bargaining agreement. Such actions include personnel actions and pay actions (alone or in combination).

§ 550.804 Determining entitlement to back pay.

(a) When an appropriate authority has determined that an employee was affected by an unjustified or unwarranted personnel action, the employee shall be entitled to back pay under section 5596 of title 5, United States Code, and this subpart only if the appropriate authority finds that the unjustified or unwarranted personnel action resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee.

(b) The requirement for a "timely appeal" is met when—

(1) An employee or an employee's personal representative initiates an appeal or grievance under an appeal or grievance system, including appeal or grievance procedures included in a collective bargaining agreement; a

claim against the Government of the United States; a discrimination complaint; or an unfair labor practice charge; and

(2) An appropriate authority accepts that appeal, grievance, claim, complaint, or charge as timely filed.

(c) The requirement for an "administrative determination" is met when an appropriate authority determines, in writing, that an employee has been affected by an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee.

(d) The requirement for "correction of the personnel action" is met when an appropriate authority, consistent with law, Executive order, rule, regulation, or mandatory personnel policy established by an agency or through a collective bargaining agreement, after a review, corrects or directs the correction of an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee.

§ 550.805 Back pay computations.

(a) When an appropriate authority corrects or directs the correction of an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due an employee—

(1) The employee shall be deemed to have performed service for the agency during the period covered by the corrective action; and

(2) The agency shall compute for the period covered by the corrective action the pay, allowances, and differentials the employee would have received if the unjustified or unwarranted personnel action had not occurred.

(b) No employee shall be granted more pay, allowances, and differentials under section 5596 of title 5, United States Code, and this subpart than he or she would have been entitled to receive if the unjustified or unwarranted personnel action had not occurred.

(c) Except as provided in paragraph (d) of this section, in computing the amount of back pay under section 5596 of title 5, United States Code, and this subpart, an agency may not include—

(1) Any period during which an employee was not ready, willing, and able to perform his or her duties because of an incapacitating illness or injury; or

(2) Any period during which an employee was unavailable for the performance of his or her duties for reasons other than those related to, or caused by, the unjustified or unwarranted personnel action.

(d) In computing the amount of back pay under section 5596 of title 5, United States Code, and this subpart, an agency shall grant, upon request of an employee, any sick or annual leave available to the employee for a period of incapacitation if the employee can establish that the period of incapacitation was the result of illness or injury.

(e) In computing the amount of back pay under section 5596 of title 5, United States Code, and this subpart, an agency shall deduct—

(1) Any amounts earned by an employee from other employment during the period covered by the corrective action; and

(2) Any erroneous payments received from the Government as a result of the unjustified or unwarranted personnel action, which, in the case of erroneous payments received from a Federal employee retirement system, shall be returned to the appropriate system. The agency shall include as other employment only employ-

ment engaged in by the employee to take the place of employment from which the employee has been separated by the unjustified or unwarranted personnel action.

(f) An agency shall credit annual leave restored to an employee as a result of the correction of an unjustified or unwarranted personnel action in excess of the maximum leave accumulation authorized by law to a separate leave account for use by the employee. The employee shall schedule and use annual leave in such a separate leave account as follows:

(1) A full-time employee shall schedule and use excess annual leave of 416 hours or less by the end of the leave year in progress 2 years after the date on which the annual leave is credited to the separate account. The agency shall extend this period by 1 leave year for each additional 208 hours of excess annual leave or any portion thereof.

(2) A part-time employee shall schedule and use excess annual leave in an amount equal to or less than 20 percent of the employee's scheduled tour of duty over a period of 52 calendar weeks by the end of the leave year in progress 2 years after the date on which the annual leave is credited to the separate account. The agency shall extend this period by 1 leave year for each additional number of hours of excess annual leave, or any portion thereof, equal to 10 percent of the employee's scheduled tour of duty over a period of 52 calendar weeks.

§ 550.806 Payment of reasonable attorney fees.

(a) An employee or an employee's personal representative may request payment of reasonable attorney fees related to an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee. Such a request may be pre-

sented only to the appropriate authority that corrected or directed the correction of the unjustified or unwarranted personnel action. However, if the finding that provides the basis for a request for payment of reasonable attorney fees is made on appeal from a decision by an appropriate authority other than the employing agency, the employee or the employee's personal representative shall present the request to the appropriate authority from which the appeal was taken.

(b) The appropriate authority to which such a request is presented shall provide an opportunity for the employing agency to respond to a request for payment of reasonable attorney fees.

(c) Except as provided in paragraph (e) of this section, when an appropriate authority corrects or directs the correction of an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due an employee, the payment of reasonable attorney fees shall be deemed to be warranted only if—

(1) Such payment is in the interest of justice, as determined by the appropriate authority in accordance with standards established by the Merit Systems Protection Board under section 7701(g) of title 5, United States Code; and

(2) There is a specific finding by the appropriate authority setting forth the reasons such payment is in the interest of justice.

(d) When an appropriate authority determines that such payment is warranted, it shall require payment of attorney fees in an amount determined to be reasonable by the appropriate authority. When an appropriate authority determines that such payment is not warranted, no such payment shall be required.

(e) When a determination by an appropriate authority that an employee has been affected by an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee is based on a finding of discrimination prohibited under section 2302(b)(1) of title 5, United States Code, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-5(k)).

(f) The payment of reasonable attorney fees shall be allowed only for the services of members of the Bar and for the services of law clerks, paralegals, or law students, when assisting members of the Bar. However, no payment may be allowed under section 5596 of title 5, United States Code, and this subpart for the services of any employee of the Federal Government, except as provided in section 205 of title 18, United States Code, relating to the activities of officers and employees in matters affecting the Government.

(g) A determination concerning whether the payment of reasonable attorney fees is in the interest of justice and concerning the amount of any such payment shall be subject to review or appeal only if provided for by statute or regulation.

(h) This section does not apply to any administrative proceeding that was pending on January 11, 1979.

§ 550.807 Prohibition against setting aside proper promotions.

Nothing in section 5596 of title 5, United States Code, or this subpart shall be construed as authorizing the setting aside of an otherwise proper promotion by a selecting official from a group of properly ranked and certified candidates.